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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

V.

CITY DISPOSAL, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING AFFIRMANCE

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INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in Internal Revenue regulations. It is located on the campus of the South Texas College of Law in Houston and shares personnel and activities with the law school.[1] It has expertise in the presentation of issues of economics and related public policy to the courts.

LFA has frequently appeared as amicus curiae in cases involving labor issues both in this honorable Supreme Court and in lower courts. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

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1 Amicus wishes to acknowledge the assistance of law student Linda Yee Chew in the preparation of this brief.

SUMMARY OF ARGUMENT

Amicus curiae will not undertake to duplicate the detailed analysis of case law or statutory language that respondent has done, although we agree with that analysis. Instead, LFA wishes to show the Court that a requirement of actual concert is grounded in sound policy reasons. The legislative history shows that Congress intended to achieve the policies that are articulated here, and they are also to be found in the cases interpreting the in concert requirement.

First, the requirement of actual concert makes it more likely that disputes will be based upon valid, significant, and widely shared claims. The requirement causes most such claims to be better focused and articulated, since they must by definition be discussed with or involve other employees. The actual concert requirement also ensures that dissident employees will not gain unfairly at the expense of fellow employees merely because they are adamant. As a consequence, a requirement of actual concerted activity ultimately fosters labor peace. The Board's approach is inconsistent with these statutory goals.

The actual concert requirement also provides a less ambiguous definition of the Board's authority than its current approach. This better definition will result in clearer limits upon the Board's jurisdiction. It will also encourage resort to less expensive dispute resolution proceedings for individual grievances.

PRELIMINARY STATEMENT: THE STATUTORY LANGUAGE IS CLEAR

The language of the Act, requiring "concerted" action for "collective" bargaining or "mutual" aid and protection, is clear and supports affirmance. The policy analysis set forth in this brief is subordinate to the language Congress adopted.

However, the NLRB asserts that the Court of Appeals reached a result that Congress "could not have intended." NLRB Brief 26-28. Amicus seeks, here, to demonstrate that the NLRB's assertion is erroneous. There are sound reasons under-

lying an actual concert requirement, and Congress not only could have intended to address them, but did.

ARGUMENT

A REQUIREMENT OF ACTUAL CONCERTED ACTIVITY IS BASED UPON SOUND POLICY REASONS THAT ARE TO BE FOUND IN BOTH THE LEGISLATIVE HISTORY AND THE CASE LAW.

1. *The "in concert" requirement increases the probability that protected activity will advance matters of significant concern to employees generally, rather than idiosyncratic preferences.* As interpreted by the Board, the Interboro doctrine empowers a single employee to make his own idiosyncratic interpretation of the interests of workers and to further the interests he thus chooses, regardless of the opinions of others. But the Congressional debate indicates clearly that the NLRA was intended to further a more democratic process,[2] in which concerns that were relatively widely shared were raised and negotiated through representatives of workers acting in concert.[3] The requirement

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2 References to industrial "democracy" as resulting from the Act are to be found throughout the legislative history. See Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. PA. L. REV. 286, 339 (1981) (hereinafter cited as Gorman). Gorman concludes (erroneously, it is submitted) that protection of "democracy" refers to protection of unilateral individual action, and this conclusion leads him in turn to argue that individual action is protected without active or "constructive" concert—a position even the Board does not endorse. "Democracy" clearly implies discussion, majoritarianism, and group action, contrary to Gorman.

3 The "democracy" was contemplated as being exercised primarily through collective bargaining and other representative mechanisms. See Emporium Capwell Co. v. Western Addition Community Organization, 420 U. S. 50 (1975); NLRB v. R. C. Cola, 328 F.2d 974, 978-79 (5th Cir. 1964). See also National Labor Relations Act section 1 (declaration of purpose).

of actual concert makes it more likely that the disputes that consume the efforts of both labor and management will be significant and legitimate ones.

In this regard, we respectfully disagree with the NLRB's assertion that a single-employee, on-the-spot work stoppage must "necessarily" affect others positively, or that it is "likely" to "work to the benefit of all." NLRB Brief at 22-23. The bulk of the Board's cases clearly show otherwise. In many of the Board's decisions on this issue, the employee is actually trying to take rights from other employees or to give less pleasant work to his fellows, and he attempts to force adoption of his view by fiat—through a unilateral work stoppage.[4] In other Board cases, the employee has sought to shield his own nonperformance from employer response.[5] There is no basis for the NLRB's assertion that a decision by one employee to take action he alone deems appropriate will work to the "benefit of all," and it contravenes the fundamental assumptions of the Act.

2. *The "in concert" requirement increases the probability that the protected activity will involve a valid, true complaint, and it decreases the likelihood of pretext.* The Board's approach does not require that the single employee complaint it protects be true or valid or supported by the collective agreement. It need not even be probably valid; in fact, it need not even be *possibly* valid. All that the Board requires is that there be some basis from which some one among many employees *might*

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4 See cases cited in note 15 infra and accompanying text.

5 For example, in NLRB v. Buddies Supermarkets, 481 F. 2d 714 (5th Cir. 1973), protracted negotiations were followed by a single employee's persistent efforts to set aside an outcome other employees deemed beneficial. The Board considered this conduct concerted; the Court of Appeals did not, and it denied enforcement. See also authorities cited in note 7 infra.

conclude, in his own mind, that the complaint is well founded.[6] Since most employees can find a way of stating personal complaints in terms of purported safety concerns, comfort, working conditions, or similar arguments, the Board's approach openly encourages pretextual complaints.

The Board's decisions disclose that the giving of pretextual explanations for claimed protected activity is a real and frequent problem.[7] The requirement of actual concert, of course, would not eliminate pretext, but if a complaint must be shared by several workers and acted upon by them together, the probability of pretext decreases.

3. *The "in concert" requirement sharpens the articulation of the dispute and focuses it.* The Board's approach to the Interboro doctrine encourages hasty and thoughtless action, in which a single employee may unilaterally decide on the spot to stop work and nevertheless frustrate any reasonable employer response. If several employees must act in actual concert, there is greater likelihood of careful formulation of the disputed issue, simply because they are likely to share the concern or discuss the action among themselves first. Furthermore, the complaint is more likely to be communicated in a manner that will lead to its peaceful resolution.

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6 John Sexton & Co., 217 N. L. R. B. 80 (1975); T & T Industries, 235 N. L. R. B. 517 (1978). In these cases, the Board "threw its protective net broadly, holding that section 7 protection applies even if the employee's complaint is ultimately found to lack merit." Gorman 284. As Gorman puts it, with reference to the Interboro doctrine, "[T]he Board makes no pretense that the individual's complaint must be . . . anchored in the labor contract; it will be deemed concerted activity whether or not the . . . contract actually supports the claim. . . ."

7 E.g., Indiana Gear Works v. NLRB, 371 F. 2d 273, 276 (7th Cir. 1967) (employee's action motivated by personal malice toward employer, not by claimed concern for general equity in wages). As Gorman demonstrates, the board's decision was not based upon

An example of the counterproductive effect of the Board's approach is to be found in Indiana Gear Works v. NLRB,[8] in which an employee publicly posted sarcastic cartoons with his own captions, cruelly and personally ridiculing the company president. He acted alone, because his fellow employees, though asked, refused to join him. He thus adopted a most counterproductive method to communicate his concern. Nevertheless, the Board ordered reinstatement (a holding consistent with its position here); the Court of Appeals—correctly, it is submitted—denied enforcement. Concerted action would have been more likely to produce a dispute better focused toward resolution.

4. *The "in concert" requirement ultimately fosters labor peace.* The single most important policy underlying the adoption of the NLRA was the goal of labor peace.[9] The "in concert" requirement, for the reasons given above, clearly furthers this Congressional goal. The Board's approach does not; indeed, in several of its cases, the Board has regarded conduct as protected even when labor peace has resulted from protracted negotiations

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neutral principles, and the reasoning could have supported acceptance of the "pretext" (wage equity) as well as it did the Court of Appeal's actual finding. Gorman 287; see also Northern Motor Carriers, Inc., 130 N. L. R. B. 261 (1961) (malice rather than pretext of working conditions); NLRB v. Lenkurt Elec. Co., 459 F. 2d 635, 638 (9th Cir. 1972) (dictum; same); Krispy Kreme Doughnut Corp. v. NLRB, 635 F. 2d 304 (4th Cir. 1980) (enforcement denied) (Board finding of concert rejected on evidence showing it was pretext for "a preoccupation with filing claims for compensation" and lax safety practices).

8 371 F. 2d 273, 276 (7th Cir. 1967). The Board considered this individual action protected; the Court of Appeals did not, and it denied enforcement. In several other cases, the board has considered as protected such "expressions" as a single employee suddenly halting work for reasons sufficient to him or her. Ontario Knife Co. v. NLRB, 637 F. 2d 840 (2d Cir. 1980) (enforcement denied); NLRB v. Dawson Cabinet Co., 566 F. 2d 1079 (8th Cir. 1977) (enforcement denied).

9 See Section 1 of the Act (statement of purpose). "All the bill does is for the sake of peace and harmony . . . . " 79 Cong. Rec. 7673, ____th Cong., ____ Sess.(1935) (remarks of Rep. Walsh).

only to be followed by a single employee's refusal to accept the negotiated outcome.[10] Furthermore, the Board's approach approves the conduct of employees who unilaterally engage in sudden work refusals,[11] even though such "one-person wildcat strikes" would usually be in violation of collective agreements if engaged in by multiple employees in concert.[12]

The Board maintains that its approach is "tailored carefully," or closely limited, to the policies of the Act. Cf. NLRB Brief at 23-24. Amicus curiae would respectfully disagree. This is a grant of power to each of perhaps thousands of employees in a firm to engage in unilateral work stoppages, limited only by the need for some minimal basis for belief and by each individual's own subjective sincerity. As Judge Brown said in NLRB v. R. C. Cola Co., 328 F. 2d 974, 978-79 (5th Cir. 1964):

> There cannot be bargaining in any real sense if the employer has to deal with individuals or splinter groups. And just as attempted negotiation with such groups or individuals would make a mockery out of bargaining, so, too, must bargaining by single agency be kept free from divisive pressures generated by dissident elements.

The remarks of supporters of the Act in Congress lead to the same conclusion:[13]

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10 E.g., NLRB v. Buddies Supermarkets, 481 F. 2d 714 (5th Cir. 1973) (enforcement denied).

11 See note 9 supra.

12 Cf. Gorman 355-56: "Most obviously, a no-strike provision . . . should have the same impact on a 'protest stoppage' by an individual . . . . (A) labor agreement will in most instances render unprotected an individual's stoppage . . . . "

13 79 Cong. Rec. 7673 (May 16, 1935) (remarks of Sen. Walshe).

> We are requiring employees to negotiate with the properly designated representatives of their employees in the hope of having peace, in the hope of removing misunderstanding . . . .

Congress sought to *avoid* unorganized work stoppages, not encourage them:[13a]

> National labor policy has been built on the premise that by pooling their economic strength . . . , the employees of an appropriate unit have the most effective means of bargaining . . . . The policy, therefore, extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees.

The NLRB's grant of authority to each individual employee to stop work for reasons sufficient to him alone is not "tailored carefully" to these objectives.

5. *The "in concert" requirement prevents idiosyncratic or obstreperous employees from benefitting unfairly at the expense of fellow employees.* The Board's approach does not require the employee's conduct to be consistent with fellow employees' interests for it to be protected. It can be motivated entirely by a desire to benefit ones' self at the expense of all others, so long as it "relates" in some manner to working conditions.[14] This approach means that an employee attempting to obtain working conditions that he, alone, considers beneficial, and which are dis-

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13a Id.

14 E.g., Air Surrey Corp., 229 N. L. R. B. 1064 (1977), enforcement denied on other grounds, 601 F. 2d 256 (6th Cir. 1979); Cf. NLRB v. Interforo Contractors, Inc., 388 F. 2d 495 (2d Cir. 1967) ("It is doubtful that a selfish motive negates the protection").

advantageous to every other employee in the shop, is nonetheless protected. Indeed, many of the Board's decisions in this area involve single-employee work refusals based on disputes over seniority or similar entitlements, in which the employee is by definition attempting to benefit himself at the expense of his fellows.[15] He may be able to obtain advantages in wages or working conditions merely because he is adamant, when they would be distributed differently if based on unhampered negotiation and agreement. One-employee work stoppages having such an effect are contrary to the most basic purposes of the Act.[16] A requirement of actual concert would not eliminate this result completely, but at the very least it would ensure that the employee must persuade some other workers of his position or involve them before acting on it.

The NLRB argues that "selfishness" is no guarantee that an employee's action will not benefit others, and that is true; but neither is there any basis for the NLRB's tacit assumption that selfish conduct must "necessarily" help others. NLRB Brief at 21-22. If it is joined in by none of his fellows, the assumption should be otherwise; the entire basis of the Act is that matters of real, shared concern to employees as a group are likely to lead to concerted activity, and that is one reason that concerted action is what the Act protects.

6. *The "in concert" requirement helps employers to react reasonably to individual employees' poor performance or work habits.* The Board's approach ensures that, if an employee is both a poor employee and a chronic complainer, management cannot react to his poor performance without fear that a differ-

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15 NLRB v. Selwyn Shoe Mfg. Corp., 428 F. 2d 217 (8th Cir. 1970) (employee's insubordination, based on assertation of seniority rights in effort to take work from another employee, held protected as constructively concerted); ARO, Inc. v. NLRB, 596 F. 2d 713 (6th Cir. 1979) (similar; enforcement denied); Ontario Knife Co. v. NLRB, 637 F. 2d 840 (2d Cir. 1980) (similar; enforcement denied).

16 See authorities cited in notes 2, 3, 10 supra.

ent interpretation of the facts will produce an unfair labor practice adjudication. Indeed, many of the Board's decisions in this area have involved efforts to distinguish poor performance, backbiting, and insubordination from conduct the Board has considered protected. These cases virtually always involve unpredictable inferences from diffuse and hotly contested facts.[17]

7. *The "in concert" requirement increases the employer's willingness to sign a collective bargaining agreement.* If he believes that disputes over meanings will be resolved in a consistent and organized manner (such as the contractual grievance mechanism), an employer may be willing to sign a collective bargaining agreement obligating him to provide rights that are valuable but difficult of definition. However, if the meaning of such rights as that to a "safe work place" is open to every employee's individual interpretation and provides a basis for protected individual work stoppages based on such idiosyncratic interpretations, no rational employer would willingly sign such an agreement. It must be remembered that the Board's approach does not require[18] that the claim be probably or even possibly valid, or that it be processed through the contractual grievance mechanism. Most collective agreements are lengthy and comprehensive, and the variety of individual conduct that can be "related to" them, either legitimately or pretextually, is infinite.

In this regard, the NLRB argues that an on-the-spot work stoppage will "serve as an example" for imitation by other employees. NLRB Brief at 26. But when the main restraint upon

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17 E.g., Ryder Tank Lines, Inc., 135 N. L. R. B. 936, enforcement denied on other grounds, 310 F. 2d 233 (5th Cir. 1962); R. J. Tower Iron Works, 144 N. L. R. B. 445 (1963); see also cases cited note 7, supra. See generally Gorman 289-93, 354 (labelling "chronic complainer" cases "troubling" and stating that they rest on "coincidence of facts.").

18 See note 4 supra.

such imitation is each employee's own subjective sincerity, it may be questioned whether such an example is as desirable as the NLRB assumes.

8. *The "in concert" requirement encourages resort to inexpensive alternatives for individual dispute resolution, in preference to an NLRB proceeding.* The Interboro doctrine encourages resort in the first instance to an NLRB proceeding, which is an adversary trial, followed by all the briefing, findings, and appeals of litigation, with delay before trial and, sometimes, years before decision. In contrast, most collective agreements provide for more expeditious and inexpensive grievance resolution processes.[19] The Board's current practice does not even involve deferring to such contractual procedures.[20] The "in-concert" requirement would not eliminate unnecessary litigation, but it would have greater tendency to confine Board proceedings to matters in which more protracted proceedings are useful.

Harvard University President Derek Bok, himself a labor law expert, has recently criticized certain areas of labor law[20a] as "fine-spun applications of vague, even contradictory, principles with no convincing demonstration of how the public interest is served."[20b] Even if not harmful, proceedings under such standards "do cost inordinate amounts of money, time and energy." One definitional question on labor issues, regarding an election, cost Harvard "over a year of effort and more than one hundred

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19 Cf. Gorman 356-57.

20 Id.

20a Bok, A Flawed System, 85 HARV. MAGAZINE 38, 40 (1983).

20b The distinction between "personal gripes" on the one hand, and "selfish" actions germane to working conditions on the other, is such a "fine-spun application," particularly if the NLRB's differentiation of "abusive" or "opprobrious" conduct from that "related to" the collective agreement is added. See note 22 infra.

thousand dollars." Bok concludes, "Even a rich country cannot afford to spend such sums on issues of this kind." But the Board's approach causes expensive proceedings to proliferate.

9. *The "in concert" requirement honors the sound policy in favor of clear definition of jurisdiction.* The doctrine that although "personal gripes" are not protected, self-interested conduct is protected if it is germane to working conditions or to some provision in a collective agreement, is a distinction so ethereal that it enables the Board to reach almost any result in almost any case. As Gorman puts it, the Board's decisions in this area are characterized by "elusiveness and inconsistency."[21] There is simply no clear distinction that can be made between a "personal gripe" and a "protected self-interested gripe." Sound policy dictates that the jurisdiction of an agency such as the NLRB be clearly defined. The sweep of that jurisdiction was a matter of concern to, and was carefully limited by, the Congress that passed the NLRA.[22]

CONCLUSION

The "in concert" requirement serves sound policy. The Congressional debate discloses a number of goals that Congress clearly intended to advance by passage of the NLRA, and these goals in turn are advanced by a requirement of actual concert. The NLRB's constructive concert approach, as seen in the Interboro doctrine, is in conflict with the achievement of these Congressional purposes. The case at bar was correctly decided by the Court of Appeals, and its judgment should be affirmed.

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21 Gorman 299; see generally Id. at 289-310.

22 "Nothing in the language of the Act, nor its legislative history, evidences an intent on the part of Congress . . . to intrude into the day-to-day operation of an employer's business." ARO, Inc. v. NLRB, 596 F. 2d 713 (6th Cir. 1979).

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